FEDERAL MARITIME COMMISSION

WASHINGTON, D. C.

October 15, 1996

DOCKET NO. 96-07

INTERCONEX, INC.

v.

FINN CONTAINER CARGO SERVICES, INC.

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SETTLEMENT APPROVED

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This is a dispute between complainant Interconex, Inc. ("Interconex"), an ocean freight forwarder, and Finn Container Cargo Services, Inc. ("Finn"), a non-vessel-owning common carrier, as to who is responsible for certain charges incurred on cargo consisting of oil drilling equipment shipped from Houston, TX to the West Coast by rail and by ocean vessel beyond to Keelung, Taiwan, and thence to Taipei, Taiwan, in June of 1994.

Interconex alleges that Finn violated sections 10(b)(1) and 19 of the Shipping Act of 1984, 46 U.S.C. app. §§ 1709(b)(1) and 1718, and 46 CFR 510.23, by non-payment of brokerage commission of $14,005.20; "overage" consisting of overtime trucking cost--

$3,811.12; special material for blocking and bracing--$5,620; and stripping of flat racks--$2,000. Interconex seeks reparation of $25,436.32 with interest and attorneys' fees.

In its answer, Finn admits the movement occurred as alleged but asserts that it was after modification of the original Pier/Pier agreement to Ramp/CY by Interconex.

Finn denies the allegation of non-payment of commission stating that it has paid $9,053.50 to Interconex's third-party vendor, McRay Crane & Rigging, Inc. ("McRay"), asserting claims against Interconex and Finn (in connection with loading the cargo on rail cars) and has consistently offered payment of the outstanding balance of $4,951.17 to Interconex which has refused to accept such tender. Stated otherwise, Finn states that it has offered to pay Interconex the sought commission of $14,005.20 less third-party claims in the amount of $9,053.50. (Finn states that it was paid $140,052 US freight for the shipment of drilling equipment to Taiwan. This amount is not in contention.)

Finn denies that it had any agreement to pay Interconex the other sought damages of overtime trucking charges of $3,811.12, special material for blocking and bracing of $5,620, and $2,000 for stripping of flat racks totaling $11,431.12 sought upon this Ramp/CY transaction.

Interconex submitted as its evidence portions of a deposition conducted by the parties on October 18, 1995, of Neil Connelly, a traffic coordinator for Finn at the time of the shipments in issue.

Interconex originally arranged for shipment of the oil drilling equipment from the Laney Rig Yard, Houston, TX, to Taipei, Taiwan, on a "pier to pier" movement. This meant loading the cargo on trucks for movement to the break bulk yard, the ship channel in

Houston, and loading on an ocean vessel for delivery at the pier in Taipei. Instead of a truck-water movement Finn suggested a counter proposal of "ramp to CY" which meant that the cargo would have to be trucked to the rail ramp for movement to Long Beach, CA and ocean vessel beyond, a truck-rail-water movement. Finn stated that this routing would reduce the transit time by 50 percent. Interconex agreed and the bill of lading states "ramp to CY."

Finn provided nine flatrack containers required for movement of the cargo on rail cars. Cranes were rented from McRay to load the cargo on the flatracks. Finn offered to pay the difference in costs between the "pier to pier" route and the "ramp/CY" route, except that Finn would not accept any added labor costs. Finn was willing to pay the difference in preparing the cargo, packaging it and delivering it but not any added labor costs. Under either proposal the cargo would be loaded by crane on a truck and moved from the Laney Rig Yard to either a pier or to a rail ramp.

There was some problem with the billing at the railroad and two or three trucks had to wait resulting in added charges of $35 per hour. Mr. Connelly stated that this was Finn's responsibility since Finn had agreed to pay all added costs except labor in excess of those incurred on a pier to pier movement. On the rail movement Finn would also be responsible for the additional costs for blocking, bracing, and chaining.

The oil rigs consisted of 36 pieces. Two of the pieces required loading by crane. (This was the responsibility of Interconex.) Neither the parties nor Laney Rig Yard had a crane. The other 34 pieces could have been loaded in another manner such as a winch. Thus, Finn would be responsible for the charges for 34 pieces. From the total list for the

36 pieces, the charges for the four-hour minimum to load the two pieces by crane onto a truck would be deducted. (Exhibits 1 shows total rental charges from McRay to Interconex of $1,235.) Exhibit 4 is a bill from Interconex to Finn for overtime trucking costs of $3,811.12 and special material costs of $5,620, totaling $9,431.12. The deponent for Finn stated that overtime trucking costs and special material costs to take the material off the trucks were to be billed by Interconex to Finn--anything over what would have been required for a pier delivery. Without any backup (supporting documents) the deponent could not agree with the validity of the figures or amounts listed.

On cross-examination by Finn, Mr. Connelly testified that in a Ramp/CY movement, as indicated on the bill of lading in issue, Finn's responsibilities would begin at the Santa Fe rail yard and end at the container yard in Keelung, Taiwan; that the carrier is not required to unload the cargo from the flatrack; that any extra charges for unloading after the container yard destination is reached are the responsibility of the consignee, in this case Bilfinger & Berger, the purchaser of the cargo in Taiwan.

Mr. Connelly also testified that on a pier-to-pier movement any added truck charges, such as waiting five hours to unload cargo, would be the responsibility of the shipper, here Interconex; that any overtime cost would likewise be charged back to the shipper; that if the longshoremen had to obtain equipment that they did not have in their possession to unload the cargo, they would have previously arranged for a charge to be levied against the shipper.

The record shows that Finn suggested the oil rig would get to Taipei much faster if the routing was changed from Pier/Pier to Ramp/CY. Interconex agreed and the bill of lading states "Ramp/CY." In any event it is the tariff, not the bill of lading, that determines

the applicable rates and charges for a shipment. *Union Carbide Inter-America v. Norton Line,* 14 F.M.C. 262 (1971), and *Envirex, Inc. v. COSCO,* 26 SRR 813, 818 (1993).

## DISCUSSION

The parties engaged in extensive settlement discussions culminating in an agreement. *Delhi Petroleum Pty. Ltd. v. U.S. Atlantic & Gulf/Australia-New Zealand Conference and Columbus Line, Inc.,* ____F.M.C.____, 24 SRR 1129, 1134 (1988) *("Delhi Petroleum"),* contains a succinct statement of the criteria examined by the Commission in determining whether to approve a settlement:

> Generally, when examining settlements, the Commission looks to see if the settlement has a reasonable basis and reflects the careful consideration by the parties of such factors as the relative strengths of their positions weighed against the risks and costs of continued litigation. Furthermore, if it is the considered judgment of the parties that whatever benefits might result from vindication of their positions would be outweighed by the costs of continued litigation and if the settlement otherwise complies with law the Commission authorizes the settlement.

See also *Old Ben Coal Co. v. Sea-Land Service, Inc.,* 21 F.M.C. 506 (1978). In cases involving rate disputes, the Commission must also be satisfied that the settlement is "a bona fide attempt by the parties to terminate their controversy and not a device to obtain transportation at other than the applicable rates and charges. . . ." *Organic Chemicals (Glidden-Durkee) Corp. v. Atlanttrafik,* ____F.M.C.____, 18 SRR 1536a, 1539-40 (1979).

Each of the parties has examined the relative strengths and weaknesses of its position, the cost of continued litigation and the likelihood of success or failure if this

complaint proceeding were continued to finality. In the end they have decided that a fair settlement of this proceeding involving the amount of the commission would be for Finn Container Cargo Services, Inc. to pay Interconex, Inc. $13,000 payable in four equal monthly installments of $3,250 commencing October 10, 1996. This is without prejudice to any claims pending in court. This settlement agreement comports with the *Delhi Petroleum* criteria and will be approved.

IT IS ORDERED:

Pursuant to the stipulation of the parties and the settlement agreement approved herein, Finn Container Cargo Services, Inc. will pay Interconex, Inc. $13,000 payable in four equal monthly installments of $3,250 commencing October 10, 1996. This proceeding will remain open until complainant Interconex advises this office that the final installment of $3,250 has been received. At that time the complaint will be dismissed without prejudice to the claims asserted by Interconex, Inc. in cause no. 640,428 in the County Civil Court at Law No. 4 of Harris County, Texas, entitled *McRay Crane & Rigging, Inc. vs. Finn Container Cargo Service, Inc. and Interconex, Inc.*, and the claim by Finn Container for damages relating to the payment of crane charges to McRay in the approximate amount of $9,000.00.

Frederick M. Dolan, Jr.
Administrative Law Judges